HVAC Mechanical Services, Inc., *and* Sheet Metal Workers Local 53, AFL–CIO. Case 16–CA–18730

January 31, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On April 14, 1998, Administrative Law Judge George Carson II issued the attached bench decision. The Respondent filed exceptions and a supporting brief. Pursuant to a notice and invitation to file briefs issued on June 22, 2000, the General Counsel and the Respondent filed supplemental briefs addressing the application to this case of *FES,* 331 NLRB 9 (2000).

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions. For the reasons set forth below, the Board has decided to remand the case for further proceedings consistent with this Decision and Order.

In *FES,* supra at 15, the Board held that the elements of a discriminatory refusal-to-consider violation are: "(1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation."

Here, as the judge found, Doug McGee and Paul Alderete applied for employment together on March 5, 1997. The Respondent actively considered their applications, including arranging for them to take a preemployment drug test. In the course of the application process, Wayne Revis told the two applicants that the Respondent had 2 years' worth of work for them. When McGee informed Revis that they intended to picket and organize the Respondent, however, Revis stated that "if that's what you gonna do, Johnny [the individual who had referred McGee and Alderete to the Respondent] can find you something else" and terminated any further action on their applications. We agree with the judge that these circumstances warrant the inference that the Respondent's refusal to consider McGee and Alderete for employment was motivated by their union affiliation. Further, the Respondent failed to show that it would not have considered them even in the absence of their union affiliation. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) by failing to consider applicants McGee and Alderete. *PNEU Electric,* 332 NLRB No. 60, slip op. at 1–2 (2000).

We reject the Respondent's contention that McGee and Alderete were not genuine applicants, but instead were engaged in an effort to "entrap" the Respondent into violating the Act. It is well-settled that union organizers who apply for employment are employees entitled to the protections of the Act notwithstanding their intent to attempt to organize the Respondent if hired. See *NLRB v. Town & Country Electric,* 516 U.S. 85 (1995). There is no evidence to support the Respondent's speculation that McGee or Alderete were not interested in obtaining employment with the Respondent, or that they did not intend to perform their assigned duties if hired. To the contrary, McGee specifically stated to Revis that he would do a good job for the Respondent if hired. Although McGee also stated that he intended to organize the Respondent and picket "in the morning," these statements do not establish that McGee was not a bona fide applicant. See *PNEU Electric,* supra, slip op. at 1, 11. See also *Lipsey, Inc.,* 172 NLRB 1535 (1968) (rejecting contention that job application by union adherent who intended to honor picket line if hired was improper effort to "entrap" employer). Rather, and consistent with the judge's decision, we view these statements as no more than an indication that McGee was going to affirmatively exercise rights protected by Section 7 of the Act. Id.

In its exceptions, the Respondent also contends that the judge erred in finding that Revis was its agent. The Respondent's contentions are wholly without merit. The Respondent's vice-president, Michael Deatherage, testified that, if the Respondent needed workers in Revis's area, Operations Manager Don Spence could direct Revis to call Mechanical Contracting Services, Inc. to obtain the needed manpower.[1] Similarly, Field Sheet Metal Supervisor Jonathan Valeski testified that Revis and he both had the authority to interview applicants and make recommendations.[2] This uncontradicted testimony amply establishes that Revis was the Respondent's agent for the purpose of handling the applications for employment submitted by McGee and Alderete. See, e.g., *GM Electrics,* 323 NLRB 125–126 (1997) (secretary who was assigned to distribute and collect job applications and inform applicants of respondent's hiring needs held agent with respect to application process); *Diehl Equipment Co.,* 297 NLRB 504 fn. 2, 507 fn. 21 (1989) (same).

Although finding a refusal to consider violation, the judge found that the General Counsel had not established

[1] Mechanical Contracting Services was the agency that referred McGee and Alderete to the Respondent.

[2] Valeski also testified that Revis and he did not have the authority to make hiring decisions.

that the Respondent unlawfully refused to hire McGee and Alderete because the General Counsel failed to establish that their applications were reviewed by any individual with the authority to make hiring decisions. The judge's recommended remedy reserved for the compliance stage of this proceeding the issue of whether McGee and Alderete would have been hired absent the discriminatory refusal to consider.[3] In his supplemental brief, the General Counsel urges the Board to adopt the judge's recommended order, which provides this remedy. However, as set forth in *FES,* supra at 14, "If the General Counsel is seeking a remedy of instatement and backpay based on openings that he knows or should have known have arisen prior to the commencement of the hearing on the merits, he must allege and prove the existence of those openings at the unfair labor practice hearing." Accordingly, consistent with *FES*, we shall remand this proceeding to the judge for the purposes of reopening the record, if necessary, and resolving the issue of whether McGee and Alderete would have been hired for any openings that occurred prior to the unfair labor practice hearing in this case absent the Respondent's discrimination against them. Further, if hiring occurred between the opening of the initial hearing and the reopening of the hearing on remand, the General Counsel must also litigate the question of whether the discriminatees would have been hired for any such subsequent openings in the absence of the discriminatory refusal to consider them. *FES,* supra at 18.

We recognize that no party has excepted to the judge's finding that the Respondent was not shown to have refused to hire McGee and Alderete. However, as stated above, the General Counsel prevailed on the merits of the discriminatory refusal-to-consider allegation, and the judge expressly reserved the refusal-to-hire issue for the compliance stage. In these circumstances, Section 102.46(b)(2) of the Board's Rules and Regulations, providing that any exception not urged shall be deemed to have been waived, does not preclude consideration of the refusal to hire issue. *FES,* supra at 1 fn. 3.[4]

[3] The judge noted that Revis's statement that the Respondent had 2 years of work for the discriminatees was disputed by the Respondent's witnesses.

[4] We note that the Respondent, in its supplemental brief, agrees that this case must be remanded for consideration of, among other things, the issues presented in *FES.* At the reopened hearing, the Respondent is, of course, entitled to adduce evidence in support of any defenses it may have to the refusal to hire allegation which were not fully litigated at the prior hearing. See *FES,* supra at 17 fn. 22 and 18.

ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge George Carson II for appropriate action consistent with this Decision and Order.

It IS FURTHER ORDERED that the judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Robert G. Levy II, Esq., for the General Counsel.
John J. Browne, Esq., for the Respondent.
Patrick M. Flynn, Esq., for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Houston, Texas, on March 23, 1998. The charge was filed on June 9, 1997,1 and the complaint issued on October 7. The complaint alleges that Respondent, HVAC Mechanical Services, Inc., refused to hire and/or consider for hire Doug McGee and Paul Alderete in violation of Section 8(a)(1) and (3) of the National Labor Relations Act. Respondent's timely answer admits that it is an employer engaged in commerce and denies any violation of the Act. General Counsel requested that I issue a Bench Decision, and Respondent did not object. At the conclusion of the hearing, I issued a Bench Decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations.

Respondent, in its answer and at the hearing, denied that fabrication products supervisor Wayne Revis was a supervisor or agent as defined in the Act. I found it unnecessary to determine whether Revis was a supervisor within the meaning of Section 2(11) of the Act since he was an agent within the meaning of Section 2(13) of the Act. Revis ceased to continue the application process of McGee and Alderete after McGee stated his intention to engage in organizational activity protected by Section 7 of the Act. Although Revis was an agent, he did not have final authority to hire. Thus I found that Respondent, by the actions of Revis, did not refuse to hire McGee and Alderete; rather, it refused to consider them for hire.

I certify the accuracy of the portion of the transcript that sets out my decision, attached hereto as Appendix A, page 155, line 2, through page 159, line 2.

CONCLUSIONS OF LAW

1. The Respondent is a commercial and industrial air conditioning contractor operating from a facility in Houston, Texas, where it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside the State of Texas, and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Sheet Metal Workers Local 54, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to consider for hire Doug McGee and Paul Alderete because of their membership in, and activities on behalf of, Sheet Metal Workers Local 54, AFL–CIO, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[1] All dates are 1997 unless otherwise indicated.

Respondent shall be ordered to consider McGee and Alderete for hire. On March 5, Revis told McGee that Respondent had two years of work, but Respondent's witnesses disputed this. On April 29, Revis told McGee that employees had been laid off. In view of the foregoing, and consistent with my finding that Respondent unlawfully failed to consider McGee and Alderete for hire, I shall leave for the compliance stage of this proceeding the determination of whether either of the discriminatees would have been hired and for how long each would have worked. *H. B. Zachery Co.*, 319 NLRB 967 (1995).

If it is determined that either of the discriminatees would have been hired in the absence of Respondent's discrimination, Respondent must make the discriminatees whole for any loss of earnings and other benefits, computed on a quarterly basis from March 5, 1997, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended2

ORDER

The Respondent, HVAC Mechanical Services, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to consider for hire applicants because they are members of Sheet Metal Workers Local 54, AFL–CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer those of the employee-applicants named below who would currently be employed, but for the Respondent's unlawful refusal to consider them for hire, employment in the positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against by the Respondent.

Doug McGee Paul Alderete

(b) Make whole Doug McGee and Paul Alderete for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Houston, Texas, copies of the attached notice marked "Appendix."3 Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 5, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to consider for hire applicants because they are members of Sheet Metal Workers Local 54, AFL–CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer those of the employee-applicants named below who would currently be employed, but for our unlawful refusal to consider them for hire, employment in the positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled if they had not been discriminated against.

Doug McGee Paul Alderete

WE WILL make whole those of the employee-applicants named above who would have been employed, but for our
unlawful refusal to consider them for hire, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

HVAC MECHANICAL SERVICES, INC.

APPENDIX A

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Both of the parties have argued orally before me, and I have listened and considered those arguments. The facts with regard to the transaction that occurred on March 5 of 1997 are not in dispute. Doug McGee and Paul Alderete went to Respondent's facility after having conversations with a representative of a temporary agency that the Respondent has used for the purpose of referring temporary labor to Respondent for some number of years.

Once they got there, they spoke with Wayne Revis, R-E-V-IS, who at that time was Respondent's fabrication products supervisor. Mr. McGee, on behalf of himself and Mr. Alderete, expressed a preference for duct work, as opposed to panel-type fabrication work in the shop. And after doing so, Mr. Revis, in response to that expressed preference, took them upstairs in the same building that they were in to Mr. Valeski's office, where they spoke and where Mr. McGee identified himself as an organizer for and on behalf of Sheet Metal Workers Local Number 54

There are no Section 8(a)(1) allegations in the complaint. And Mr. Valeski made no statement that—indicated any significant antipathy towards Mr. McGee as a result of his identification of himself as an organizer with Local 54. He indicated that he did not have any field work.

And shortly thereafter, Mr. Revis again appeared at the

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upstairs office, Mr. Valeski's office. And Mr. Valeski indicated—

Off the record.

(Off the record.)

JUDGE CARSON: On the record.

And the transcript which as been placed into the evidence—into evidence as General Counsel's Exhibit 4 reflects that Valeski indicated that, when the field work started getting a little bit more filled up, he would start calling. And Mr. McGee then directs a question to Mr. Revis, saying, "Can you use us down there, or not," a statement which I—which clearly refers to the shop. And he responds, For the next two years. Mr. McGee says, Meaning what? And Mr. Revis says, Yes, I can keep you tied up for two years, guaranteed.

I appreciate counsel for Respondent's concern relative to a surreptitious taping. By the same token, the evidence, in fact, is before me, and it has not been controverted in any way.

The conversation at the point that Mr. Revis came back into Mr. Valeski's office is uncontradicted. It involved both of the applicants and two individuals in Respondent's employ, one of whom is a supervisor and one of whom is the field project superintendent. And I have uncontradicted testimony before me that both of them have the authority to interview individuals who are applying for employment. Thereafter, Mr. Revis, with the two applicants, crosses the street and obtains blank forms

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and then proceeds with them in order to take a drug test.

It is clear on the basis of this evidence that whether Mr. Revis was or was not a statutory supervisor is irrelevant; he clearly was an agent with regard to facilitating the application process. Insofar as he was acting as an agent in facilitating the application process, I must examine his actions at the time that he stopped the application process.

And, relative to that, he stopped the application process when Mr. McGee did not let his position as an organizer stand without explanation. Rather, he went further and indicated what he intended to do, and one of the things that he intended to do was to picket. And, obviously, insofar as this Respondent is not unionized, I assume that we would be talking about an informational picket.

In any event, he indicated that he was going to affirmatively exercise rights protected by Section 7 of the Act. And at that point, Mr. Revis retrieved the application from him, stating, Forget the drug test; I've got other things to do.

I—having heard the testimony with regard to the final decision or the ultimate decision with regard to actual hire being vested in Mr. Spence, who is not—as Counsel for the General Counsel notes, is not with us today, I find that General Counsel has not established an actual refusal to hire in that the individual who had the actual authority to hire never had contact with the two discriminatees, Mr. McGee and Mr. Alderete.

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However, Respondent's agent with regard to the application process, Mr. Revis, did, upon learning of the specific organizational activities or, at least, one of the specific organizational activities in which Mr. McGee and, certainly, by implication, Mr. Alderete, who was with him, intended to engage, the application process stopped.

In view of the foregoing and the entire record, I find that the Respondent has, through its agent, Wayne Revis, failed to consider for employment Doug McGee and Paul Alderete, in violation of Section 8(a)(3) of the National Labor Relations Act.

Upon receipt of the transcript, I shall conform this decision, which will be attached thereto as an appendix, and indicate the appropriate remedy. Obviously, in ultimate terms, the remedy will be a matter for compliance.

And, relative to that, Mr. Browne, the contentions that have been touched upon here but have not been established with regard to the existence or non-existence of positions for sheet metal workers will be able to be ultimately determined. Upon receipt of my final written decision which will incorporate this decision as an appendix, you will have the normal time in which to take exception before the Board.

As I've indicated, the facts are not in dispute. And I'm satisfied that, on the basis of the record, the totality of the conduct of Mr. Revis does, in fact, establish that he was an

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agent for the application process. And I have so found.

That concludes my decision.